



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Justices of the Constitutional Court

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SEPARATE OPINION

Riga, 6 March 2019

Case No. 2018-10-0103

“On Compliance of Section 237.¹, Paragraph two of the Criminal Law, in the Wording in Force from 1 April 2013 to 1 December 2015, with Article 90 and the Second Sentence of Article 92 of the Constitution of the Republic of Latvia and with Sub-clause “e” of Division 10A905 of the Annex to Cabinet Regulation No 645 of 25 September 2007, Regulations on the National List of Goods and Services of Strategic Significance, in the Wording in Force from 28 November 2009 to 23 January 2014, with the Second Sentence of Article 92 of the Constitution of the Republic of Latvia”.

1. On 21 February 2019, the Constitutional Court rendered a judgment in Case No 2018-10-0103 “On Compliance of Section 237.¹, Paragraph two of the Criminal Law, in the Wording in Force from 1 April 2013 to 1 December 2015, with Article 90 and the Second Sentence of Article 92 of the Constitution of the Republic of Latvia and with Sub-clause “e” of Division 10A905 of the Annex to Cabinet Regulation No 645 of 25 September 2007, Regulations on the National List of Goods and Services of Strategic Significance, in the Wording in Force from 28 November 2009 to 23 January 2014, with the Second Sentence of Article 92 of the Constitution of the Republic of Latvia” (hereinafter – the Judgment). The contested provisions were recognised as conforming to the provisions of higher legal force.

The case was initiated on the basis of a constitutional complaint by Mareks Beluga.

In our separate opinion, we will use the abbreviations used in the Judgment.

2. We agree that the contested provision of the Criminal Law, if properly applied in the case of the Applicant and other similar cases, could conform to Article 90 and the second sentence of Article 92 of the Constitution, however, we do not agree with some of the arguments provided by the Constitutional Court. Moreover, we cannot agree with the conclusions included in the Judgment on the conformity of the contested provision with the second sentence of Article 92 of the Constitution.

Our view is based on the following arguments.

3. We disagree with the Court's definition of the scope of Articles 90 and 92 of the Constitution in paragraph 13 of the Judgment. The Court's ruling on the conformity of the contested provisions with the Constitution directly depends on how the scope of fundamental rights of a person is defined in the Judgment. In our opinion, these articles of the Constitution, especially when their scope is assessed in conjunction with Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, guarantee a person broader rights than those indicated in the Judgment.

3.1. Article 90 of the Constitution determines the following: “Everyone has the right to know about his or her rights.” It is considered one of the most important principles of the rule of law, which facilitates the exercise of human rights and freedoms enshrined in the Constitution and international treaties. Thus, the rights included in Article 90 of the Constitution are the basis for ensuring other fundamental rights, as well as an essential and necessary component of the principle of the effectiveness of law. Moreover, the content and scope of this provision of fundamental rights directly affect the content and scope of other provisions of fundamental rights, including Articles 1, 89 and 92 of the Constitution (*see, e.g.: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. [Commentaries on the Constitution of the Republic of Latvia. Chapter VIII. Fundamental human rights]. A group of authors under the scientific supervision of R. Balodis. – Riga: Latvijas Vēstnesis, 2011, pp. 61 and 62).*

The Constitutional Court has indicated that the fact that this provision introduces the catalogue of fundamental rights included in the Constitution indicates the importance that the legislator has attached to embedding this fundamental right in the Constitution. The Constitution provides for a person's right to be informed of their rights and obligations. The State is obliged not only to adopt laws and regulations governing the conduct of persons in a wide range of legal relationships, but also to establish a mechanism to ensure that persons are informed about changes to and the content of that legal framework. It provides for the right of a person entering into public legal relations with state authorities to be informed about their rights in the given relations (*see Judgement of the Constitutional Court of 20 December 2006 in Case No 2006-12-01, paragraph 16*).

The criteria for the quality of legal provisions derive inter alia from Article 90 of the Constitution. First, it follows from the Constitutional system that the criteria for the quality of legal provisions relate to the adoption and proclamation of a legal provision: every legal provision must be adopted in accordance with the procedure laid down in laws and regulations, as well as duly proclaimed and accessible, i.e., only duly adopted and published universally binding provisions can be recognised as “law” within the meaning of Article 90 of the Constitution. Second, it follows from Article 90 of the Constitution that any legal provision must be sufficiently clear and foreseeable (*cf., e.g., Judgment of the Constitutional Court of 20 December 2006 in Case No 2006-12-01, paragraph 16, and Judgment of 30 March 2011 in Case No 2010-60-01, paragraph 15.2*). The Constitutional Court has recognised previously that the clarity and foreseeability of a legal provision must be assessed on the basis of its interpretation, and indicated this in the Judgment, too. Namely, a legal provision may be recognised as unclear if it is impossible to ascertain its true meaning using techniques of interpretation (*cf. Judgment of the Constitutional Court of 30 March 2011 in Case No 2010-60-01, paragraph 15.2*). The right of a person to know their rights determines the framework within which the legislator operates, since only a provision that meets all the criteria for the quality of a legal provision can be recognised as law, i.e. be endowed with legal force.

3.2. Second sentence of Section 92 of the Constitution: “Everyone shall be presumed innocent until his or her guilt has been established in accordance with law.” The Constitutional Court has already recognised that this provision of the Constitution, inter alia, includes the principle *nullum crimen, nulla poena sine lege*, i.e. the principle

that a person may be found guilty and punished only for conduct that has been recognised as criminal in accordance with the law (*cf. Judgment of the Constitutional Court of 16 December 2008 in Case No 2008-09-0106, paragraph 4.2*). This is a fundamental right that was included in the earliest catalogues of fundamental rights, for example in Article 7 of the French Declaration of the Rights of Man and of the Citizen of 1798 (*cf.: Déclaration des Droits de l'Homme et du Citoyen de 1789. Available at: [https://www.legifrance.gouv.fr/Droit-francais/Constitution/ Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789](https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789)*), since they protect a person against arbitrary State action. This fundamental right therefore requires the legislator to take particular care in drafting the rules providing for criminal liability.

3.3. Article 90 and the second sentence of Article 92 of the Constitution are closely interlinked. Their scope and the systemic understanding thereof is influenced by a number of general principles of law, such as the principles of legal security, legal certainty and legality, which ensure that a person's rights are not arbitrarily restricted. With regard to the field of criminal law, these principles and, consequently, the right enshrined in Article 90 and the second sentence of Article 92 of the Constitution, require the legislator to clearly define the constituent elements of criminal offences and the corresponding penalties. Moreover, a legislative process that complies with the requirements for the adoption of a legal provision in a democratic state governed by the rule of law is a prerequisite draw up a high-quality legal provision. In our view, the conclusion of the Judgment that compliance with the procedure for adopting a legal provision is not an element impacting the quality of a legal rule is not justified.

The ECHR has also established that the concept of law in Article 7 of the Convention includes qualitative requirements, including accessibility and foreseeability (*cf., see, e.g., Judgment of the European Court of Human Rights of 11 November 1996 in Cantoni v. France, Application No 17862/91, paragraph 29; Judgment of 12 February 2008 in Kafkaris v. Cyprus, Application No 21906/04, paragraph 140; Judgment of 21 October 2013 in Del Río Prada v. Spain, Application No 42750/09, paragraph 91; and Judgment of 15 October 2015 in Perinçek v. Switzerland, Application No 27510/08, paragraph 134*). These are by no means the only requirements for the quality of a legal provision, as these requirements concern both the definition of a criminal offence, as well as the penalty and its level (*see, e.g., Judgment of the European Court of Human Rights of 12 February 2008 in Kafkaris v. Cyprus, Application No 21906/04, paragraph 150, and Judgment of 22 January 2013*

in Camilleri v. Malta, Application No 42931/10, paragraphs 39 to 45). The ECHR considers that the inadequate quality of a legal provision constitutes a violation of Article 7 of the Convention.

It is important to note that the ECHR has recognised that when a person commits a criminal offence, they must be aware of the legal provision under which they can be held criminally liable. Namely, the criterion of the foreseeability of a legal provision must first be analysed from the point of view of the convicted person. Thus, at the very moment when an offence is committed for which criminal liability later arises, such a legal provision must be in force from which the person concerned can clearly understand or, if necessary, with legal advice, ascertain that the action or failure to act is criminal (*see, e.g., Judgment of the European Court of Human Rights of 21 October 2013 in Del Río Prada v. Spain, Application No 42750/09, paragraph 79*).

A person's opinion on the clarity of a legal provision may be formed by studying the practice of its application and by seeking legal assistance in clarifying the content of that provision. A person's "surprise" at being prosecuted, i.e. the fact that they did not realise that certain conduct could lead to criminal prosecution, may raise questions about the quality of the legal provision, i.e. its clarity and foreseeability. Also in such a case, in a democratic state governed by the rule of law doubts would arise as to whether the legal provisions establishing the constituent elements of the criminal offence in question comply with the principle that everyone knows their rights and obligations. Violations committed by the state in this area can undermine a person's confidence in the rule of law.

3.4. We agree with the statement in paragraph 13.2 of the Judgment that, to establish the constitutionality of the contested provisions, the Constitutional Court must examine their compliance with the second sentence of Article 92 of the Constitution, since the concept of "law" used in this sentence falls within the concept of "right" included in Article 90 of the Constitution. We also agree with this paragraph that "criminal liability is the most serious form of legal responsibility and its consequences can have a significant impact on a person's life even after serving a criminal sentence", and that's why "rules providing for criminal liability must be more specific than provisions in other branches of law". However, the Judgment does not take into account the requirements for legal provisions, which, when assessing the constitutionality of legal provisions imposing criminal liability, derive from the specific scope of Article 90 and the second sentence of Article 92 of the Constitution.

4. The contested provision of the Criminal Law is a blanket legal provision, the content of which is to be revealed by means of other provisions, in the present case, inter alia, also the contested provision of the Regulation.

In their application, The Applicant expressed doubts that the contested provision of the Regulation was issued within the limits of the authorisation granted to the Cabinet of Ministers by the *Saeima*.

4.1. The authorisation to adopt the contested provision of the Regulation is to be found not in the Criminal Law, but in the Law on Circulation of Goods of Strategic Significance. At the time when the contested provision of the Criminal Law was adopted, the contested provision of the Regulation was already in force.

Paragraph 17.1 of the Judgment found that Regulation No.645 was drafted at the same time as amendments to the Law on the Circulation of Goods of Strategic Significance, which, among other things, were intended to authorise the Cabinet of Ministers to establish the List”. However, the Judgment did not pay sufficient attention to the fact that the Cabinet had issued Regulation No 645 earlier than the *Saeima* delegated to it the right to issue such regulations by the aforementioned law. Thus, the legislator retroactively legitimised an external legal act issued by the executive power, namely Regulation No 645. In turn, when adopting the contested provision of the Criminal Law, the *Saeima* took into account the authorisation to the Cabinet of Ministers contained in Section 3, Paragraph one of the Law on Circulation of Goods of Strategic Significance. At the time when the contested provision of the Criminal Law was adopted, the corresponding delegation was already included in the Law on Circulation of Goods of Strategic Significance. However, the regulation in this area, as well as the solution of the delegation, was primarily related to the way in which goods of strategic significance are circulated in the country, i.e. it was primarily related to commercial activity. This is clearly demonstrated by the purpose of the Law on Circulation of Goods of Strategic Significance as set out in Section 2 of the Law: “The purpose of this Law is to ensure controlled circulation of goods of strategic significance [..].” The specific principles that the legislator must respect with regard to the clarity of provisions in the field of criminal law were not respected in the drafting of the relevant regulation. In addition, it should also be pointed out that the Cabinet of Ministers' action in adopting the List before it had been authorised to do so by law is a violation of the principle of separation of powers and a departure from the practice of

good lawmaking, which is not permissible in a democratic state governed by the rule of law.

4.2. We would also like to point out that, in addition to the above-mentioned laws and regulations which should be taken into account when ascertaining the content of the contested provision of the Criminal Law, another law should be taken into account, namely, the Operational Activities Law. Thus, for a person who presumably has no legal education to ascertain the content of the contested provision of the Criminal Law, they must find and interpret legal provisions contained in at least five different laws and regulations: the Criminal Law, Regulation No 645, the Law on Circulation of Goods of Strategic Significance, the Operational Activities Law, as well as Cabinet Regulation No 926 of 18 August 2009, Regulations Regarding the Circulation of the Equipment, Devices or Instruments and their Components Specially Designed or Adapted for the Operational Activity Measures to be Performed by a Specific Method. When assessing the clarity of a legal provision that provides for criminal liability, which, according to the case law of the Constitutional Court, is the most serious restriction of fundamental rights in terms of its consequences, the Constitutional Court should particularly scrutinise the quality of the contested legal provision.

When the Operational Activities Law, Regulation No 645 and the contested provision of the Criminal Law are viewed in conjunction, it is difficult to find a clear empowering link between the law and the act issued under delegated legislation, since obstruction of operational activities measures is not defined as an operational activity in the Operational Activities Law. The contested provision of the Criminal Law provides for criminal liability only for “violation of the prohibition on circulation of specially designed or adapted equipment, devices or instruments and their components for special operational measures”. In particular, the contested provision of the Criminal Law does not mention equipment intended to obstruct operational activities. Devices intended for obstruction of operational activities were neither mentioned in the materials of the relevant draft law nor in the discussions of the legislator before the adoption of the contested provision of the Criminal Law (*see, e.g., Case file, vol. 4, pp. 77, 92, 138 and 139; as well as the transcript of the 11th Saeima sitting of 12 December 2013. Available at: <http://saeima.lv/lv/transcripts/view/149>*). Other party to the proceedings – Aldis Lieljuksis – also emphasises: “It follows from the Operational Activities Law that the special method operational activities measures are aimed at active acquisition and preservation of information, as well as investigatory

entry to ensure the performance of other operational activities measures”. He takes the view that the contested provision of the Criminal Law does not cover equipment intended to obstruct special method operational activities measures (*see paragraph 12 of the Judgment*). Thus, the contested provision of the Regulation has not been issued in accordance with the Operational Activities Law.

The second sentence of Article 92 of the Constitution requires the legislator to take special care in defining offences subject to criminal liability. Therefore, if the legislator wished to establish a penalty not only for violation of the prohibition on circulation of specially designed or adapted equipment for special operational measures, but also for violation of the prohibition on the circulation of equipment intended to obstruct such measures, the legislator should have included it *expressis verbis* in the provision determining criminal liability. Thus, although the contested provision of the Regulation complies with the authorisation contained in the Law on the Circulation of Goods of Strategic Significance, a person could not clearly understand from the contested provision of the Criminal Law that it establishes criminal liability also for the equipment mentioned in the contested provision of the Regulation, which is intended to obstruct operational activities measures. The decision of the court of first instance in the case of the Applicant also indicates a certain lack of clarity (*see Case file, vol. 1, pp. 58*).

Consequently, the contested provision of the Regulation, in so far as it is applied in establishing criminal liability for violation of the prohibition on circulation of equipment intended for obstruction of operational activities measures, is incompatible with the second sentence of Article 92 of the Constitution.

5. In our opinion, when examining Case No 2018-10-0103, the Constitutional Court should have also taken into account other relevant considerations.

5.1. The Applicant considers that the fact that the contested provision of the Criminal Law was not sufficiently clear is also evidenced by the amendments to the contested provision of the Criminal Law and Section 5.¹, Paragraph one of the Law on Circulation of Goods of Strategic Significance, by which the prohibition of circulation of equipment and devices intended for obstruction of operational activities was included in the legal structure of the above-mentioned provisions. During the examination of the case, both the *Saeima* and some of the other parties emphasised that any legal provision can be improved, even if it was sufficiently clear before the amendment (*see, e.g.,*

paragraphs 3 and 11 of the Judgment). However, in this case, we believe that instead of improving the clarity of the provision, the Law of 12 November 2015 on Amendments to the Criminal Code introduced a new regulation, according to which criminal liability was also determined for violation of the prohibition on the circulation of devices or equipment intended to obstruct operational activities measures. However, Section 5.¹ Paragraph one of the Law on Circulation of Goods of Strategic Significance was amended only on 31 March 2016, which was supplemented with a new authorisation for the Cabinet of Ministers to include on the List also equipment and devices intended to obstruct operational activities measures, which were previously included on the List *ultra vires*. Thus, in relation to the contested provision of the Regulation, the legislator again retroactively legitimised an external universally binding provision issued by the Cabinet of Ministers *ultra vires*, i.e., without authorisation. In the context of criminal law, this is a severe violation of fundamental rights.

5.2. Contrary to what the Judgment claims, Regulation No 645, which included the names of equipment and devices, does not comply with the principle of technology neutrality, since the introduction on the market of a new product with functions similar to those of the listed equipment would not bring it within the scope of the contested provision of the Criminal Law. The 4 October 2016 amendments to the List closed this loophole by including a description of the use of the prohibited devices.

However, the statement that the names of the equipment and devices included on the List are, according to the Cabinet of Ministers and a number of other parties, sufficiently clear for a person to be aware that the acquisition of such equipment or devices would expose them to criminal liability is questionable, since the List also includes, *inter alia*, quite ordinary goods used in households and offices, for example, scanners. The list did not include an explanation of the technical characteristics that these devices must meet to qualify as items of strategic significance.

5.3. According to the Applicant, the contested provisions are not sufficiently clear and foreseeable also because a person without special knowledge, even with the assistance of a lawyer, would not be able to ascertain whether a particular device belongs to any of the groups of goods included on the List. This is evidenced by the provisions of the Law on the Circulation of Goods of Strategic Significance, according to which the authorities may refer to the Committee for the identification of a specific good and, if necessary, obtain an expert opinion. The Applicant's view that the identification of the devices requires the assistance of an expert was also confirmed by

a number of other parties, such as the Committee and the State Security Service (*see paragraphs 8 and 9 of the Judgment*). However, the mere fact that, as established by the Constitutional Court, the Republic of Latvia has established a procedure for a person to find out whether a particular piece of equipment is included on the List and what circulation restrictions apply to it (*see paragraph 20 of the Judgment*) does not fully resolve the issue of the provision's clarity. During the proceedings, the other parties, such as the State Police, pointed out that if a person in possession of a device on the List wishes to find out what that device is and seeks appropriate advice, criminal proceedings under Section 237.¹, Paragraph two of the Criminal Law may immediately be initiated against them (*see paragraph 10 of the Judgment*). Bearing in mind the case law of the ECHR (*see paragraph 3.3 of this Separate Opinion*), we still have doubts as to whether the contested provision of the Criminal Law was sufficiently clear to the Applicant at the time when it was applied to them.

In a democratic State governed by the rule of law, a person who has lawfully acquired a piece of new technology equipment or a device does not need to seek immediate legal advice to find out whether they have unwittingly committed a criminal offence. In examining the case, the Constitutional Court did not sufficiently assess the importance of other EU Member States and the Schengen Agreement for the free movement of goods and services, including the equipment included on the List. The Constitutional Court found that not all equipment and devices included on the List have been removed from civil circulation in other European Union member states, or that their circulation is significantly restricted. Therefore, a law-abiding person who has lawfully acquired a good in another EU Member State and brought it into Latvia without customs and border guard control might not have a reasonable doubt that they may have committed a criminal offence.

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